No. 14,706

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC FAR EAST LINES, INC., a corporation,

Appellant,

vs.

JOHN WILLIAMS,

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Texts

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BRIEF FOR APPELLEE.

FACTS.

John Williams, a longshoreman, was employed by West Coast Terminals, a stevedoring company. The West Coast Terminals, by agreement with Pacific Far East Lines, Inc., a corporation, furnished longshoremen to load the S.S. FLEETWOOD a refrigerator ship. Among the longshoremen who went to work on the S.S. FLEETWOOD was the appellee.

At a few minutes before midnight the longshoremen replaced the five insulation plugs in the No. 5 hatch prior to leaving for their midnight lunch. As soon as this had been done it became the duty of the reefer engineer, an employee of the appellant, to turn on the

blowers in the hold and to turn off the fixed hold lights. This is done in order to lower the temperature in the hold which inevitably rises while the plugs are off and the hold is being loaded.

At 1:00 A.M. the longshoremen returned to work. Their first task was to remove the plugs. The reefer engineer has the duty at this time to turn off the blowers and to turn on the fixed hold lights.

Williams and another longshoreman climbed down onto the plugs and hooked the key plug onto a wire sling connected with the cargo winch. Both longshoremen then got out of the way, Williams by leaving the hatch. It is necessary to get well away because a plug is large and heavy and there is a possibility that it may swing. There is no evidence as to where his partner went.

The winch lifted the plug and carried it over to the inshore deck of the ship where it was unhooked by two other longshoremen.

Williams then started back into the hatch to hook up next plug. He came back by walking sideways along the coaming holding onto the guard rail until he was in position above the ladder which leads into the hold. At that point he stepped back and down to the first handhold on the ladder, slipped on the frost which had formed there and fell through the 9′6″ by 4 foot opening into the hold, sustaining very serious and permanently disabling injuries.

The method used by Williams of leaving and returning to the hatch was one customarily used by longshoremen.

The usual lighting provided by a ship for night work while a hatch is being uncovered is as follows: permanent floodlights on the king posts, or masts, shining down in the area, some small amount of reflected light from the dock lights, portable cargo lights supplied by the ship and fixed lights in the hold.

At the time Williams was injured, however, the floodlights from the king post and the lights from the dock were both blocked out by the presence of a large tent over the hold. The lights in the hold which throw light up on the ladder were not turned on. The only lighting available was that given off by the cargo lights.

After the hatch has been opened the cargo lights are hung down into the hatch. However, until the hatch has been opened, they cannot be hung down in this manner.

The usual cargo light, and presumably the ones supplied, is uninsulated. It uses a three hundred watt globe with a reflector. There is a wire cage over the front which is flat so that it can be placed face down when it is not in use. There are two ways to hold these lights: by a cord fastened to the base of the light or by holding the uninsulated base in the hand. The cargo lights were turned on at least eight hours before the accident.

When the cargo lights are sitting on the deck before the hatch has been completely opened, the hatch coaming blocks off most of the light they give from the hatch area.

The only place provided for lashing a cargo light so that it will light the hatch area is to the guard rail which runs in front of the winch driver. There is an ever present danger that it may be smashed by a swinging plug if this is done.

If a longshoreman were to hold a cargo light so that it shone in the area it would be almost impossible to hold the light in such a fashion as to give effective lighting and not run the very real danger of temporarily blinding one of the constantly moving longshoremen in the partly opened hatch area or the winchdriver.

In the area by the ladder frost or ice had formed from the action of the cold air blown up from the hold striking the warmer air above.

Williams was unable to see that this area had frosted up, because of the inadequate lighting provided by the ship, and slipped on the frost and fell into the hold.

On the basis of the facts presented, the arguments made by counsel, and the instructions of the court, the jury found that the defendant was negligent or that the ship was unseaworthy and returned a verdict in favor of the plaintiff.

ARGUMENT.

I

THE JURY FOUND THAT WILLIAMS WAS INJURED DUE TO THE NEGLIGENCE OF THE SHIPOWNER OR THE UNSEAWORTHINESS OF THE VESSEL AND SUCH FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Counsel for appellant throughout his brief ignores one of the most important aspects of this case. Each and every factual issue urged here either was or could have been argued to the jury. The jury decided adversely to him and found that the ship was unseaworthy or that the shipowner was negligent or both.

On disputed questions of fact the verdict of a jury will be treated as controlling for even if the question is a close one that fact will not justify either the trial judge or the reviewing Court in usurping the function of the jury.

Gardiner v. The New York & Porto Rico SS Co., 146 F2d 420 (CCA 2d 1944);

Jacob v. City of New York, 315 US 752, 757, 86 L Ed 1166, 62 S Ct 854;

Norris, The Law of Seamen, Sec. 697.

At the close of this brief, after arguments raised by appellant have been answered this point will be discussed further.

A. The evidence shows that Williams slipped and fell after he had stepped down to the first rung of the ladder.

The substance of Williams' testimony is that at the time he fell he had one foot on the top of the hatch coaming and had stepped down with the other foot. He had stepped, of course, on the top rung of the

ladder, the handhold. That foot slipped and he fell. This was clearly understood on trial.

Pertinent extracts of his testimony are as follows:

Mr. Williams testified in part as follows:

> Q. Well, as I understood your testimony, you started here—on direct—and then something happened and you got knocked unconscious, is that correct?
>
> A. I says my last remembrance is *when I stepped down,* my foot slipped, that's the last remembrance I had. I don't remember the rest, what happened after then, I don't remember. (59.)

The following testimony in the deposition of Williams was read on trial by counsel for the appellant:

> Q. Now you say at the time you fell, you had one foot on this, what do you call it?
>
> A. On that, yes, on the coaming.
>
> Q. On the coaming?
>
> A. Yes, sir.
>
> Q. I see. And the other foot was where?
>
> A. Getting off, where I was getting off, just like (indicating)——
>
> Q. ——You stepped back with the other foot, is that right?
>
> A. You have to step back. (253.)*

Other pertinent testimony on this point was given by Houston Hall, a longshoreman:

> Q. Did you notice when you went over to see what had happened, did you notice any unusual substance in the area?

---

*Otherwise unidentified arabic numerals in parentheses are page references to the printed transcript.

A. Well, naturally when there's someone falling, and I come over there to look, I try to see what happened or hear what happened, and I could see upon the frosty part, just like something hit there and slid off, up above the steps, just like it hit there and slid. (indicating.) (135.)

It is entirely reasonable to infer, if such inference be necessary, that Mr. Williams had put his foot on the upper handhold at the time he fell. Hall, in court, indicated the area of the skid mark as being close to and below the upper handholds.

A reasonable interpretation, and the one that was made at trial, of the words "When I stepped down, my foot slipped", is that the person concerned had stepped someplace. The only place to step when one "starts back down to hook up the next plug" is on the upper handhold.

This particular point was not argued on trial nor mentioned at the time that appellant was making his motion for a directed verdict which is printed in the printed transcript at pages 283 and following.

If there are two possible interpretations of the meaning of words used and two possible inferences to be drawn the meaning and the inference which will support the verdict of the jury should, of course, be drawn.

B. The evidence shows that the lighting in the area of the plugs, the ladder and the coaming was so inadequate as to render this area unsafe.

The top of the hatch coaming is 2 feet 9 inches above the level of the plugs (241). The distance from the plugs to the first handhold is 1 foot 6¼ inches (241).

The substance of appellant's argument is that althought the lighting was admittedly inadequate on top of the plugs there is no showing that it was inadequate 1 foot 6¼ inches above the top of the plugs. Plaintiff's exhibit 6F, a copy of which is attached to appellant's brief, shows the absurdity of this contention.

The testimony of the witnesses indicates that light from the flood lights on the king post was blocked off by the tent, light from the dock lights was largely blocked by the tent and was of no importance so far as lighting the hatch area is concerned (235, 236), and that the fixed hold lights were not on. The only lighting available was that given off by the cargo lights which were sitting on deck, face down on their wire guards. The coaming stands 28 inches above the deck. (180.) The coaming stands 8¾ inches above the top of the winch platform. (239.)

It is manifestly impossible for the cargo lights, facing the deck, to provide any appreciable amount of light in the hatch area, on the coaming or elsewhere because the light would be blocked by the coaming. Therefore it is clearly shown, and the jury apparently so found, that there was inadequate lighting in the area from which Williams fell.

William J. Wines, called on behalf of the appellant, testified in part as follows:

Q. Now in this particular——

A. On deck.

Q. ——night, when you returned to work, to the best of your recollection, will you tell us whether or not there was any cargo light hanging on the guardrail behind which the winch driver stands? I mean any place along the guardrail?

A. There was two laying offshore and one kind of setting up, one was laying flat and one setting up so it's kind of—well, it didn't flash the whole light on, but it was a dim light on the hatch. (310.)

* * * * * * *

Q. I see. And that was on the offshore side. Would you tell us where it was setting?

A. Setting right by the hatch, right by the coaming.

Q. And shining across the hatch?

A. It wasn't shining across the hatch, it was shining just against the hatch. It was a little below the coaming, offshore. (311.)

* * * * * * *

Q. Where was it in reference to the rail, in reference to this guardrail, where was it?

A. On the other side on the deck here, like this.

Q. You mean on the main deck?

A. On the main deck, yes.

Q. And not on the winch driver's platform?

A. No, no. (312, 313.)

Relevant parts of the testimony of Houston Hall are as follows:

Q. Well, Mr. Hall, on this particular evening, what lighting was provided by the ship?

A. The ship there had a cargo, had cargo lights which they hang aboard the ship in the coaming. That was the only light, then, which was, at the time he fell, you see, they couldn't hang those lights there because it would cut them off and so they naturally, then, *they were down upon the deck.* (131.)

* * * * * * *

Q. That is to say, you couldn't leave the cargo lights hanging down there where the men were working, you had to haul them up before you put ths plugs on and put them somewhere on deck, is that correct?

A. Yes. (140.)

This evidence shows that the cargo lights were sitting on the deck at the time Williams fell. Even if the jury chose to believe that a cargo light was sitting on its side it would make no appreciable difference in the amount of lighting available in the area from which Williams fell.

Counsel for the appellant seeks to draw an inference that the lighting was adequate from the fact that none of the longshoremen present in court had complained about the lighting. If such an inference could be drawn the jury could have drawn it. An equally plausible inference is that the longshoremen had a job to do and wanted to get it done.

C. Sufficient testimony as to the presence of frost in the area from which Williams fell was presented.

Both eyewitness testimony and expert testimony was presented on this point. Appellants also called an expert witness to dispute the issue. The jury heard both opinions.

Relevant extracts from the testimony of Houston Hall, an eyewitness, is as follows:

> Q. Then you were pointing right here, is that correct?
>
> A. I could see the frost, it was formed, ice was, approximately, ice up here, but it was frosty up here, from where the plug was pulled out. Naturally, that pressure from the fan blows up and it blows that cold air, stuff, out and it forms. (141.)
>
> * * * * * * *
>
> Q. Is that where you saw the frost?
>
> A. I saw it up here, it was forming, you know, the fog.
>
> Q. You mean up in this area here, is that right?
>
> A. Yes.
>
> Q. Along the face of the iron, is that what you are telling us?
>
> A. Yes, in here, yes, because when they pulled the plug up, well naturally, the cold air blowing with the blowers on, it sheets it up. (142.)

Relevant parts of the testimony of Jim Hotchkiss, a refrigeration engineer, are as follows:

> Q. Mr. Hotchkiss, let's take this area, this enclosure here, for instance. If this area is closed, as shown up here in Plaintiff's exhibit No. 2, and the air in that area below is refrigerated to 10

degrees, and then that area is opened by lifting out a section of it, as shown here in Plaintiff's exhibit No. 1, resulting in an opening as shown in Plaintiff's Exhibit No. 3, and the air outside here, prior to the removal of this object here, was 52 degrees, would the meeting of those two airs at different temperatures cause any foreign—any substance at all to be deposited in the area shown here? And I will mark this.

A. Use my pen.

Q. All right, mark it L-1.

* * * * * * *

The Court. All right, now you can answer the question.

The Witness. It would cause, as the temperature dropped, an immediate temperature drop and precipitation of moisture here. You have a difference of 10 degrees below, there's 52 degrees here. I would say that there would be an immediate temperature drop to below 32, causing, as she dropped, precipitation of moisture from the atmosphere, then freezing of such moisture at that point. (196, 197.)

The testimony of the above witnesses was thus, to the effect that on the night Williams was injured there was frost on the hatch coaming in the vicinity of the ladder (the word "iron" used by Hall meant the coaming) and expert testimony that this was a natural and usual physical phenomenon.

D. Sufficient testimony was presented to show that the fixed hold lights were not on, that the Refeer engineer had a duty to turn them on and had not done so, and that if the hold lights had been on that they would have lighted the area of the ladder.

The blueprint of the ship was introduced into evidence. According to the blueprint the twelve fixed lights in the Number 5 hold had the following specification: "Water tight cargo fixture with guard, 100 WATTS". (225.)

Counsel for appellant objected to the introduction of direct evidence as to the effect of the lack of the hatch lights.

Relevant extracts from Ray Stewart's testimony are as follows:

> Q. If the hatch lights were on, would it have made a difference in the visibility there, Mr. Williams*?
>
> Mr. Cooper. Object to that, calls for the conclusion of the witness, if the Court please. (86.)
>
> * * * * * * *
>
> Q. (by Miss Johnson). If the hatch lights had been on, could you, would it have made any difference in your work——
>
> Mr. Cooper. Same objection, if the Court please, calling for a conclusion.
>
> The Court. Sustained. (86.)

Williams testified in part as follows:

> Q. Mr. Williams, do you know where the nearest light to these steps is located on the ship, fixed light?

---

*The question was actually addressed to Mr. Stewart.

A. Well supposed to be down in the bottom.

Q. Would you point out——I don't believe you have the other pointer.

A. It is supposed to be down here.

Q. Do you know how many lights are supposed to be up under there?

A. I don't know exactly just how many.

Q. Is it more than one?

A. Yes, it is supposed to be some for each plug they take out.

Q. On the night that this accident happened, when the key plug was taken out, were those lights on?

A. No, they were not on. (80.)

A relevant extract of Stewart's testimony is as follows:

Q. It was not. How do you know the hatch lights weren't on?

A. Because it was dark when I looked down those steps. (86.) t

The question of whether these hold lights would light the area from which plaintiff fell was argued at length to the jury. The situation is comparable to one in which a door to a lighted room is opened into a dark room. Through the doorway light streams. Here, when the key plug was removed, light from the fixed hold lights should have streamed through, and lighted the ladder area. The lights were not on; no light came up.

II.

SUFFICIENT EVIDENCE WAS PRESENTED TO SHOW THAT THE LIGHTING PROVIDED BY THE SHIPOWNER WAS INADEQUATE AND FOR THIS REASON THE SHIP WAS UNSEAWORTHY OR THE DEFENDANT WAS NEGLIGENT.

Counsel for appellant states that there was uncontradicted evidence that all necessary equipment and electrical power to adequately light the area was furnished by it to the longshoremen.

This is not the case. There was evidence which showed that three cargo lights were furnished by it to the longshoremen and that this was the only effectual lighting available at the time Williams fell. The question as to whether these cargo lights provided or could have provided sufficient illumination at the time Williams fell was sharply controverted and the jury decided adversely to the appellant.

There was insufficient illumination on top of the plugs and on the inside of the coaming, including the ladder area, so long as the cargo lights were sitting on deck, either face down or on their side because the outside wall of the coaming would block off the greater part of the light which they gave.

Counsel for appellant suggests that these cargo lights could give sufficient illumination in the area in which Williams was working if the longshoremen did one of the two following things: lash a light on the offshore side of the guard rail near the winch driver, or station a longshoreman to hold one of the cargo lights so that it would shine in the hatch area.

The plugs are large, heavy objects with a tendency to swing when they are being removed from the hatch. If a plug were to hit a cargo light it would smash the light and undoubtedly send splinters of glass and metal flying around the area. Even Wishard, first mate of the SS FLEETWOOD, did not advocate that this be done.

The pertinent parts of his testimony are as follows:

> Q. Would it be a good practice, taking into account your duties to guard the gear of the ship and keep it from being broken, to have a lamp such as this lashed on the offshore when they are removing plugs in that area?
>
> Mr. Cooper. Read the question, please. I am not sure I understood it.
>
> (Record read.)
>
> **A. I would rather not have them do it.**
>
> Q. (by Miss Johnson). Is there danger of the light being broken?
>
> A. If they lift the plug in a hurry, it would, maybe, smash the light. (181.)

Mr. Wishard estimated that the plugs weigh close to 400 pounds each. (181.)

The danger that the light would be smashed was substantiated by other witnesses.

Counsel's second suggestion (i.e. that a longshoreman hold a cargo light and shine it in the hatch area) is essentially a suggestion that the way to remedy one dangerous situation is to substitute another equally dangerous. There are two men in the hatch area re-

moving plug and a winch driver at the end of the hatch. It would be virtually impossible to hold a bright, hot cargo light in such a way that it would light the area and yet not shine it in the eyes of one of the men working in the undeniably dangerous, partially open hatch area. This was grudgingly admitted by the 1st mate, Wishard.

Pertinent parts of his testimony are as follows:

Q. (by Miss Johnson). Now, Mr. Wishard, when are those lights turned on?

A. When the longshoremen plug them in, if they are not already plugged in.

Q. Well, when there's a night crew on, what time would they be plugged in?

A. Oh, at sundown or during the day. They plug them in any time they wish them.

Q. But in any case, it would be by 7:00 in the evening. Do they remain on all evening?

A. They do.

Q. Then the lights in use around the No. 5 hatch had been on from 7:00 in the evening until 1:00 in the morning, is that correct?

A. They had.

Q. Without being turned off?

A. Right.

Q. Mr. Wishard, every light that I have anything to do with heats up. Does not the 300-watt bulb heat up?

A. *They heat up very, very much.*

Q. Then how could they hold it in the position you have just suggested?

A. I have never seen anybody get burned and I have held them. The guard, itself, I mean the shade, itself, doesn't seem to heat up that much.

Q. Could you hold it barehanded?

A. Yes.

Q. After it has been on from 7:00 in the evening until 1:00 in the morning?

A. Yes.

Q. You could hold the guard?

A. Yes.

Q. Does this give a bright light?

A. 300 watts?

Q. Yes.

A. Yes.

Q. Have you ever looked into a 300-watt light?

A. I have.

Q. And did it affect your vision?

A. It did.

Q. What happened?

A. Well, for a minute it blurs you.

Q. When the stevedores, the longshoremen, are removing plugs, are they, the men actually in the plug area, are they in one position at all times or do they move around?

A. They move around.

Q. Do they get up and down?

A. They do.

Q. Do they squat down to hook in the hooks, stand up, walk back, climb up on the coaming and so on? Is that correct?

A. They do.

Q. In other words, do they face different ways?

A. In their job, yes.

Q. So that if this were faced down into the hold, if they were squatted down, would it be possible the light would shine in their eyes?

A. In one instance, maybe. (178 ff.)

Ray Stewart confirmed this testimony.

Q. Then the light or lights. If a cargo light were shown, were held up, have you ever looked into a cargo light when it has been held up.

A. Yes.

Q. What was the effect upon you?

A. It blinds you. (103.)

Houston Hall also confirmed this. His testimony has reference to cargo lights.

Q. And did he have it down on the cord or was he holding it in his hand, or how?

A. Well, he has got to hold the light down at all times, because if he come up there and holds the light up, well, that would blind the winch driver. The winch driver can't see. (138.)

The same problem could be presented if a cargo light were lashed to the guard rail.

Counsel for appellant has taken the position that sufficient and adequate lighting was supplied to the longshoremen when the cargo lights were given to them. They take the further position that the presence or the absence of any other lights is immaterial.

If we assume for the sake of argument that his position is correct then we are presented with one simple question, "Were the cargo lights, in the absence of other effective lighting, sufficient to provide a safe and seaworthy place to work?"

This question was presented to the jury and the jury apparently found that in view of the above testi-

mony that the cargo lights by themselves were not sufficient to adequately light the area from which Williams fell at the time he fell.

The shipowner has an absolute, non-delegable duty to provide a safe and seaworthy ship and appliances to longshoremen.

Seas Shipping Company v. Sieracki (1946), 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872;

Petterson v. Alaska SS Co., 205 F. 2d 478, affd. without opinion by the United States Supreme Court in 348 U.S. 914.

As the Court in the *Petterson* case declared:

"The exercise of due diligence does not relieve the owner of his obligation to furnish adequate appliances. * * * It is not necessary to show, as it is in negligence cases that the shipowner had complete control of the instrumentality causing the injury; or that the result would not have occurred unless someone were negligent. It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. (Mahnich v. Southern SS Co., 321 U.S. 96, 64, S.Ct. 455, 88 L.Ed. 561.)"

The jury could reasonably have found that the appellant breached his obligation to furnish adequate appliances to the longshoremen.

The United States Supreme Court held in the case of *Mahnich v. Southern S.S. Co.* (1944), 321 U.S. 96, 103, 88 L.Ed. 561, 64 S.Ct. 455 that the appliance must be adequate for the purpose for which it is ordinarily used and its inadequacy renders it unsea-

worthy. In this case the appliances, i.e. the cargo lights, were inadequate for the purposes for which they were supplied, i.e. to light the hatch area while the hatch was being opened, therefore they were unseaworthy.

After Williams fell a cargo light was picked up by a longshoreman and hung down into the hatch below the level of the plugs in order to see what or who had fallen. This fact bears no relation to the adequacy of the lighting at the time Williams fell. It was agreed by all witnesses that the cargo lights could not be put in the hold until the plugs were removed under normal circumstances. The fact that it was necessary to lower a light merely serves to substantiate the fact that the hold lights were not on.

Counsel for appellant has cited many cases all of which presuppose that an adequate amount of light was supplied to the longshoreman. This is a basic issue in this case and since the jury could have found that the cargo lights were inadequate and that the hold lights were not on and the tent blocked other lighting and that therefore the lighting supplied was, in fact, not adequate these cases have no application.

III

THE HOLD LIGHTS CAST ILLUMINATION IN THE AREA FROM WHICH PLAINTIFF FELL IF THEY ARE ON.

Counsel for appellant argues that the fixed hold lights were not intended by the shipowners to light the hatch coaming area.

This is not a situation in which an item intended for one purpose is used for another. This might be a reasonable argument if a longshoreman had been using a hatch light fixture to lift cargo. Cases cited by appellant fall in this category. Lights have but one use, that is, to provide illumination. The intention of the shipowners in providing these lights was presumably to provide illumination in the hatch area and whether they would provide and were intended to provide light in one area and not in a place three or four feet away is a question of fact which was argued to the jury.

It could reasonably be inferred from the testimony given that the hold lights would have provided light in the area from which Williams fell had they been on and that they were used and relied upon by the longshoremen for this purpose.

IV

THE SO-CALLED "COOKINGHAM" OR "TRANSITORY DOCTRINE" IS NOT THE LAW IN THE 9TH CIRCUIT, AND IF IT WERE IT WOULD NOT APPLY TO THE FACTS OF THIS CASE.

The Cookingham or "Transitory Doctrine" is simply the old-common law "slipping" doctrine applied in seaman and longshoremen cases. The basis of this doctrine as stated in *Cookingham v. United States,* 3rd Circuit, 184 F. 2d 213, is that there should be no liability under the doctrine of unseaworthiness

on a shipowner for a temporarily unsafe condition on shipboard when he has no *knowledge or control* over its happening and has not had an opportunity to correct it.

In this case a foreign substance, to-wit, jello, had been spilled on a stairway and there was no showing as to where it came from.

In all cases where it has been applied the basis of the plaintiff's cause of action has been the presence of a foreign substance, oil, food, water, etc. on a deck or stairway, and no showing was made that the defendant knew or should have known that it was there.

Such a doctrine has nothing to do with the facts presented in this case. The defendants knew of the presence of the tent which cut off all lighting except that supplied by the cargo lights and the hold lights. They knew that the hold lights were not on—they turned them off and had the duty to turn them on. They knew or should have known that the hatch area would not be a reasonably safe place to work while the plugs were being removed because the longshoreman had only two unsafe alternatives: to work with inadequate lighting or to risk being temporarily blinded by a cargo light. This dangerous situation existed over and over again, when the ship was being worked at night over a period of years.

Appellant had both knowledge and control, of the lighting provided the longshoreman.

Such a doctrine has no more relevance to the facts of this case than it would in an automobile accident

case where the defendant neglected to watch where he was going for just a moment.

However, even if this doctrine could be applied to the present case it is not the law in the Ninth Circuit.

In the recent case of *Petterson v. Alaska S.S. Co.*, 348 U.S. 914, 205 F. 2d 478 (9th Circuit), the Court in its opinion stated:

> "It is not necessary to show, as it is in negligence cases that the shipowner had complete control of the instrumentality causing the injury or that the result would not have occurred unless someone were negligent. It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. Mahnich v. Southern SS Co., 321 U.S. 96, 64 S. Ct. 455, 88 L.Ed. 561."

In regards the so-called "relinquishment of control doctrine" the Court in its opinion stated:

> "The analysis of the relinquishment of control doctrine above made shows that its major premise is that the liability of the shipowner to the stevedore is based upon negligence. We have shown the major premise to be incorrect; thus the entire doctrine is incorrect, and it should not be applied here."

This language could equally well be applied to the present case. The basis of the "transitory" doctrine is knowledge, control, and opportunity to remedy. These are essentially negligence requirements and have no place in an action under the doctrine of unseaworthiness.

The language in the recent 9th Circuit Court of Appeals case, *Lahde v. Soc. Armadora Del Norte, a corporation,* 220 F. 2d 357 (1955), would seem to deny the "transitory" doctrine. In this case libelant sought damages for injuries arising from his falling into an open hatch in an illy lighted passage way leading to his place of work. The District Court dismissed the libel on the grounds that it failed to state a cause of action either based on unseaworthiness of the vessel or on negligence of the crew. This decree was reversed. The Court in its opinion stated:

> "However, under recent decisions of the Supreme Court, we think such a cause of action is stated even though the unseaworthy condition is *unknown* to the owner. Boudoin v. Lykes Bros. Steamship Co., Inc., 75 S.Ct. 382. There Boudoin, a seaman, recovered damages for a blow on the head from another seaman. The attacking seaman, on evidence of his conduct *after* his attack, was found to have a savage and vicious nature, so different from the ordinary seaman that his presence made the vessel unseaworthy and recovery was based on that ground. There is not the slightest evidence that the owner knew or could have known of the vicious character of the attaching seaman when Boudoin was hit on the head and the cause of action arose. The district Court held the vessel unseaworthy because of the attacking seaman's vicious nature and that *'the warranty of seaworthiness is a kind of liability without fault in which knowledge of the circumstances creating the unseaworthiness is immaterial.'* Boudoin v. Lykes Bros. S.S. Co., D.C. 112 F. Supp. 177, 180. The court of appeals

reversed, holding that the 'shipowners' were not shown to have knowledge of the seaman's character.

The Supreme Court in reversing the court of appeals and affirming the district court, stated (75 S.Ct. 385):

'We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other. A seaman with a proclivity for assaulting people may, indeed, be a more deadly risk than a rope with a weak strand or a hull with a latent defect.'

The failure to replace the gear of the two hatchboards on the open hatch in the dim light is certainly as dangerous as unseaworthiness as the vicious nature of a crew member. Here, as in the latter case, the vessel would be liable though **the unseaworthiness is unknown to the owner.**''

The Court then cited the case of *Mahnich v. Southern S.S. Co.,* 321 U.S. 96, 64 S.Ct. 455, 456, 88 L.Ed. 561 at length and in particular emphasized the following quotation:

''Whether the petitioner (the owner) knew of the defective condition of the rope does not appear, but in any case the seaman, in the performance of his duties, is not deemed to assume the risk of unseaworthy appliances. (Citations.)

The Court then stated:

The shipowner as much owed to its invitee stevedore as to a sailor the duty to furnish 'the employee * * * a safe place to work' and 'is nondelegable' as it is not in 'non-maritime'.

> It is immaterial whether the shipowner, invitor of the stevedore on the ship, knew of the failure to place the ship's 'appliances', here two hatchboards, on the open hatch dangerous in the defective lighting, since it owed the same 'nondelegable' duty to furnish him a safe place to work as does a land employer."

This case seems substantially similar to the *Lahde* case and certainly the same reasoning should be applied.

THE COURT BELOW DID NOT COMMIT PREJUDICIAL ERROR BY REFUSING TO GIVE CERTAIN INSTRUCTIONS REQUESTED BY APPELLANT.

I.

Appellant's proposed Instructions Nos. 4A, 4B, 7A and 7B.

These instructions all deal with the "Transitory" conditions. The Court below did not commit error by refusing to give them for the reasons outlined in the section immediately preceding this section.

II.

Appellant's proposed Instruction No. 11A.

This instruction states in effect that the cargo lights by themselves constitute adequate lighting at the time Williams was injured. The Court below did not commit error by refusing to give this instruction because this was, actually, one of the basic factual issues of the case and it was correctly submitted to the jury for their consideration and decision.

Appellant was adequately protected by the following instruction which was given by the Court below:

"You are instructed that the actual loading operations of the vessel were being done by the stevedoring company, the West Coast Terminals, Inc., and their employees, the longshoremen. If the defendant's duty to furnish a seaworthy vessel, together with seaworthy equipment and appliances, and its duty to provide a reasonably safe place to work, has been fulfilled, and thereafter, without the knowledge of the ship operator, the stevedores negligently or improperly used, handled or rigged such equipment and appliances, the ship operator, the defendant in this case is not liable for the consequences."

III.

Appellant's proposed Instructions 21A and 21B.

These instructions, in effect, direct the jury to find Williams guilty of contributory negligence because he knowingly proceeded into an area that he could see was insufficiently lighted.

The Court below did not commit error by refusing to give these instructions for two reasons.

First, the question of whether or not Williams was guilty of contributory negligence, and if so, the extent thereof, is a question of fact for the jury. Adequate instructions on contributory negligence and the doctrine of comparative negligence were given by the Court below.

Some of the instructions in regards contributory negligence which were given are quoted below.

"For your guidance, contributory negligence is defined as such an act or omission upon the part

> of the person injured, amounting to the want of ordinary care, as, concurring and co-operating with the acts of a defendant, is a proximate cause of the injury complained of.
>
> * * * * * * *
>
> As it was the duty of all of the defendant's employees to exercise ordinary care, so it was the continuing duty of the plaintiff to exercise like care for his own safety, and, in so doing, to make a reasonable use of his faculties to warn him of any danger. If he failed in such duty, he, himself, was negligent. If his negligence was the sole proximate cause of the accident, then he may not recover."

The jury had been previously instructed on negligence, unseaworthiness and the burden of proof.

The case of *Read v. United States,* 201 F. 2d 758, differed from this case so widely as to be in no way applicable on this point.

Second, although counsel for appellant uses the words "contributory negligence" he is actually requesting instructions under the doctrine of assumption of the risk rather than contributory negligence. In the case of *Kulukundis v. Strand,* 202 F. 2d 608 (C.A. 9th, 1953), plaintiff, a longshoreman, was standing on a hatchcover trying to pry another hatchcover into place when the hatchcover upon which he was standing became dislodged and he fell into the hold. The cover on which he was standing was not properly fitted. This he knew or should have known. The Court declared:

> "Appellant contends that Strand assumed the risk of injury by continuing to work at closing the hatch after observing the danger involved, and that relief is consequently barred. We do not agree."

The Court then continued to the effect that assumption of the risk is not a defense barring relief in cases involving longshoremen.

The fact situations are substantially similar.

Misnaming the doctrine of assumption of the risk, as contributory negligence does not change the essential nature of the defense.

IV.

Appellant's proposed Instruction No. 26A.

This is again an instruction under the doctrine of assumption of risk, a barred defense.

The appellant was adequately protected by the following instruction given by the Court below.

> "Under the law that governs this case, the ship operator does not insure or guarantee any persons against the possibility of accident. Its duty is to exercise ordinary care and to provide a seaworthy ship and appliances. Insofar as it performs those duties, it fulfills the law and incurs no liability for accidental injury. Inherently in the nature of a steamship business are certain hazards. But even such dangers do not make the company an insurer or change the rule of liability that I have stated. Although in the exercise of ordinary care, the amount of caution required increases, as does the danger that is

known or that reasonably should be apprehended in the situation. In a case such as here presented, there is no legal presumption that negligence on the part of the defendant or its agents or employees or of any unseaworthiness of the defendant's vessels or its gear or appliances, or of contributory negligence on the part of the plaintiff."

In addition the instruction is so written that it sounds as if the jury is ordered to bring in a verdict for the defendant if they find that Williams slipped on ice or frost, and that the whole question of the adequacy of the lighting is irrelevant.

V.

Appellant's motion to instruct the jury to disregard testimony regarding the fixed hold lights.

This issue has been heretofore discussed. Suffice it to say that there is evidence that the hold lights were not on, that it is the duty of an officer of the ship to turn them on, and that when they are on they provide illumination in the area from which Williams fell.

THE FINDINGS OF THE JURY THAT WILLIAMS WAS INJURED DUE TO THE NEGLIGENCE OF THE APPELLANT OR TO THE UNSEAWORTHINESS OF THE VESSEL SHOULD BE UPHELD SINCE SUCH FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

No election was made between the cause of action for unseaworthiness and the one for negligence.

The jury could have found for the plaintiff under any one of the following theories, each of which is

supported by adequate evidence. It is, of course, necessary only that one of them be supported.

The jury could have disregarded all testimony regarding the hold lights and found the ship unseaworthy because the blinding cargo lights were not suitable lighting while the hatch was being opened, and that this unseaworthiness was the proximate cause of Williams' injury.

The jury could have disregarded all testimony regarding the hold lights and found that the shipowner was negligent in not providing more adequate lighting than the blinding cargo lights at the time the hatch was being opened in that the shipowner knew, or should have known, that these would not be sufficient particularly in view of the presence of the tent, and that this negligence was the proximate cause of Williams' injury.

The jury could have found the shipowner negligent in that the hold lights were not turned on resulting in inadequate lighting and that this negligence was the proximate cause of Williams' injury.

The jury could have found that the ship was unseaworthy in that the shipowner did not provide him with a reasonably safe place to work because the hold lights were not on, and that this was the proximate cause of Williams' injuries.

The jury could have found the ship unseaworthy or the shipowner negligent in that the hold lights were not on and the blinding cargo lights did not provide adequate illumination and that this neglect or unsea-

worthiness was the proximate cause of Williams' injury.

The evidence supporting each of these theories has been heretofore discussed and it will be mentioned only briefly here.

The evidence clearly showed that the only illumination provided by the ship at the time Williams fell was from the three cargo lights. The light from the floodlights was blocked by the tent, the dock lights give almost no illumination, and the hold lights were not on.

The evidence also showed that the cargo lights give an exceedingly bright light and that there would be grave danger of temporarily blinding a longshoreman working in the partially opened hatch area if they were held in such a fashion as to shine into the hatch area. There was no way to hang these lights up high enough to provide effective lighting and at the same time eliminate the possibility of blinding a longshoreman.

The evidence showed that it was the duty of a ship's officer to turn on the hold lights and that they were not on. It also showed that had these lights been on that they would have cast some light on the ladder area from which Williams fell.

The evidence showed that the ladder area had frosted up temporarily and that Williams could not see this due to the inadequacy of the lighting.

The jury could and apparently did find in view of all the evidence presented that the area was not ade-

quately lighted and that this inadequacy was due to the unseaworthiness of the ship or the negligence of the shipowner. They could and apparently did find that this inadequate illumination was the proximate cause of Williams' fall.

CONCLUSION.

Substantial evidence was presented to the jury upon which they could have found that the ship was unseaworthy or that the shipowner was negligent in failing to supply adequate lighting and that the unseaworthiness or neglect was the proximate cause of Williams' fall and his serious and permanently disabling injuries.

Since the verdict of the jury, as modified by the Court below, was not made with a capricious disregard of competent evidence, it is respectfully submitted that the verdict of the jury as modified by the Court below should be affirmed.

Dated, San Francisco, California,
September 23, 1955.

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